STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 20, 2011
v	Nos. 298709; 298710 Allegan Circuit Court
FORTINO GONZALEZ, Defendant-Appellant.	LC Nos. 09-016480-FC; 09-016481-FC

Before: O'CONNELL, P.J., and METER and BECKERING, JJ.

PER CURIAM.

In these consolidated cases, defendant appeals by right his convictions arising from events that transpired on August 6 and August 14, 2009. In Docket No. 298710, defendant appeals as of right his convictions arising out of the August 6 events: armed robbery, MCL 750.529; two counts of unlawful imprisonment, MCL 750.349b; two counts of assault with a dangerous weapon, MCL 750.82; assault with intent to rob while armed, MCL 750.89; and carrying a firearm during commission of a felony, MCL 750.227b. The trial court sentenced defendant to 17-1/2 to 50 years in prison for the armed robbery and assault with intent to rob while armed convictions; 10 to 15 years in prison for the unlawful imprisonment convictions; 2-1/2 to 4 years in prison for the assault with a dangerous weapon convictions; to be served consecutively to two years in prison for the felony-firearm conviction. We affirm these convictions except for the assault with intent to rob while armed conviction, which we vacate.

In Docket No. 298709, defendant appeals as of right his convictions arising out of the August 14 events: first-degree murder, MCL 750.316; first-degree home invasion, MCL 750.110a(2); and carrying a firearm during commission of a felony, MCL 750.227b. The trial court sentenced defendant to life in prison for the first-degree murder conviction and 13 to 20 years in prison for the first-degree home invasion conviction, to be served consecutively to two years in prison for the felony-firearm conviction. We affirm these convictions, but remand for resentencing on the first-degree home invasion conviction.

Defendant first argues that insufficient evidence existed to sustain several of his convictions. We review "de novo a challenge on appeal to the sufficiency of the evidence." *People v Ericksen*, 288 Mich App 192, 195; 793 NW2d 120 (2010). In reviewing sufficiency of the evidence claims, we "examine the evidence in a light most favorable to the prosecution, resolving all evidentiary conflicts in its favor, and determine whether a rational trier of fact could

have found that the essential elements of the crime were proved beyond a reasonable doubt." *Id*. at 196. We "will not interfere with the trier of fact's role of determining the weight of the evidence or the credibility of the witnesses." *People v Kanaan*, 278 Mich App 594, 619; 751 NW2d 57 (2008). "All conflicts in the evidence must be resolved in favor of the prosecution." *Id*.

Defendant first argues that insufficient evidence existed to sustain his conviction of assault with a dangerous weapon as to victim Nora Hernandez under an aiding and abetting theory. "The elements of [assault with a dangerous weapon] are (1) an assault, (2) with a dangerous weapon, and (3) with the intent to injure or place the victim in reasonable apprehension of an immediate battery." *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999); MCL 750.82(1). "A person who aids or abets the commission of a crime may be convicted and punished as if he directly committed the offense." *People v Izarraras-Placante*, 246 Mich App 490, 495; 633 NW2d 18 (2001); MCL 767.39. "To support a finding that a defendant aided and abetted a crime, the prosecution must show that (1) the crime charged was committed by the defendant or some other person, (2) the defendant performed acts or gave encouragement that assisted the commission of the crime, and (3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time he gave aid and encouragement." *Id*. at 495-496 (quotation omitted). "The aiding and abetting statute encompasses all forms of assistance rendered to the perpetrator of a crime and comprehends all words or deeds that might support, encourage, or incite the commission of a crime." *Id*. at 496 (citation omitted). A defendant's intent may be inferred from his "words, acts, means, or the manner used to commit the offense." *People v Harrison*, 283 Mich App 374, 382; 768 NW2d 98 (2009). "[B]ecause it can be difficult to prove a defendant's state of mind on issues such as knowledge and intent, minimal circumstantial evidence will suffice to establish the defendant's state of mind, which can be inferred from all the evidence presented." *Kanaan*, 278 Mich App at 622.

The evidence viewed in a light most favorable to the prosecution establishes that Hernandez was assaulted with a dangerous weapon on August 6, 2009. On that date, defendant brandished a gun and told Hernandez to come out of her bedroom. Hernandez went to the living room where defendant and Leon Villa argued over money. Defendant's accomplices, Omar Garcia and "Pelon" pointed their guns at Hernandez while defendant punched Villa in the face. Garcia and Pelon clearly assaulted Hernandez with guns with the intent to place her in reasonable apprehension of an immediate battery.

The evidence also supports a finding that defendant performed acts or gave encouragement that assisted the commission of assault with a dangerous weapon by telling Hernandez to come into a room where Garcia and Pelon held her at gunpoint. The jurors could infer defendant's intent to commit assault with a dangerous weapon from his act of using his gun to direct Hernandez to leave her bedroom.

Defendant argues that Garcia's testimony negates any inferences on the assault charges. We disagree. Although Garcia testified that defendant did not have a gun, the jurors "may choose to believe or disbelieve any witness . . . presented in reaching a verdict[,]" *People v Cummings*, 139 Mich App 286, 294; 362 NW2d 252 (1984), and we "will not resolve credibility issues anew on appeal." *People v Milstead*, 250 Mich App 391, 404; 648 NW2d 648 (2002).

Alternatively, defendant's knowledge of Garcia's and Pelon's intent to commit assault with a dangerous weapon can be inferred from their act of pointing their guns at Hernandez while in the same room where defendant was punching Villa. In sum, sufficient evidence exists to sustain defendant's conviction of assault with a dangerous weapon of Hernandez.

Defendant next argues that insufficient evidence exists to sustain his convictions of unlawful imprisonment of Hernandez and Villa. "A person commits the crime of unlawful imprisonment if he . . . knowingly restrains another person . . . by means of a weapon[.]" MCL 750.349b(1)(a). The statute defines "restrain" to mean "forcibly restrict a person's movements or to forcibly confine the person so as to interfere with that person's liberty without that person's consent . . . . The restraint does not have to exist for any particular length of time and may be related or incidental to the commission of other criminal acts." MCL 750.349b(3)(a).

The evidence viewed in a light most favorable to the prosecution establishes that defendant, Pelon, and Garcia forced Hernandez and Villa to leave the house at gunpoint. Hernandez was forced into a black car, buckled into the front seat, and driven away, following Villa's truck. When Villa stopped and ran into a Secretary of State office, defendant took out his gun. It appeared to Hernandez that defendant was going to shoot Villa. Defendant then ran to the black car and instructed Garcia and Peron to let Hernandez go. This evidence supports a finding that Pelon and Garcia knowingly restrained Hernandez with weapons so as to interfere with her liberty without her consent. The evidence also supports a finding that defendant performed acts or gave encouragement that assisted the commission of unlawful imprisonment, and that he intended the commission of unlawful imprisonment. Defendant's intent that Hernandez be unlawfully imprisoned can be inferred from his ultimate instruction to Pelon and Garcia to let Hernandez go. In sum, sufficient evidence exists to sustain defendant's conviction of unlawful imprisonment of Hernandez.

With respect to Villa, the evidence viewed in a light most favorable to the prosecution supports a finding that defendant knowingly restrained Villa with a weapon by forcing him to drive into town at gunpoint for the purpose of getting money from a bank. The evidence indicates that defendant forcibly restricted Villa's movements by holding him in the vehicle at gunpoint and by confining him so as to interfere with his liberty without his consent.

Defendant next argues that insufficient evidence of intent and premeditation and deliberation exists to sustain his conviction of first-degree premeditated murder. First-degree murder requires proof that the defendant had an intent to kill. *People v Herndon*, 246 Mich App 371, 386; 633 NW2d 376 (2001); MCL 750.316(1)(a). "To prove first-degree premeditated murder, the prosecution must establish that the defendant intentionally killed the victim and that the act of killing was premeditated and deliberate." *People v Mette*, 243 Mich App 318, 330; 621 NW2d 713 (2000). Premeditation may be established by the defendant's actions before and after the crime. *People v Plummer*, 229 Mich App 293, 300; 581 NW2d 753 (1998). Premeditation, deliberation, and intent may be inferred from all the facts and circumstances. *Id.* at 301. Both premeditation and deliberation "require sufficient time to allow the defendant to take a second look." *People v Abraham*, 234 Mich App 640, 656; 599 NW2d 736 (1999) (internal quotation omitted). Premeditation and deliberation may be established by facts related to "(1) the prior relationship of the parties; (2) the defendant's actions before the killing; (3) the

circumstances of the killing itself; and (4) the defendant's conduct after the homicide." *Id*. (quotation omitted).

The evidence viewed in a light most favorable to the prosecution supports a finding of premeditation, deliberation, and intent to kill. The testimony established that defendant and Garcia were together in Chicago, and that defendant had the idea to return to Michigan to retrieve guns. After retrieving the guns, defendant told Garcia that they were going to Villa's house. The two forced their way into Villa's house, and defendant fired a gun at Villa while wearing latex gloves (one of which contained DNA that matched defendant's DNA profile). After the shooting, defendant fled the scene and disposed of the gun and gloves. In sum, sufficient evidence exists to sustain defendant's conviction of first-degree premeditated murder. *Abraham*, 234 Mich App at 656.

Defendant next argues that insufficient evidence exists to sustain his conviction of first-degree home invasion under an aiding and abetting theory. First-degree home invasion consists of three elements: (1) breaking and entering a dwelling or entering a dwelling without permission; (2) intent when entering to commit a felony, larceny, or assault in the dwelling, or at any time while entering, present in, or exiting the dwelling commits a felony, larceny, or assault; and (3) while entering, present in, or exiting the dwelling, the defendant is either armed with a dangerous weapon, or another person is lawfully present in the dwelling. *People v Wilder*, 485 Mich 35, 43; 780 NW2d 265 (2010); MCL 750.110a(2).

The evidence viewed in a light most favorable to the prosecution establishes that Garcia used a sledgehammer to gain entry to Villa's house, and that Garcia fired a shot into the room where Villa was standing. This evidence supports the finding that Garcia engaged in first-degree home invasion. The evidence also supports a finding that defendant performed acts or gave encouragement that assisted in the home invasion, by providing the sledgehammer and directing Garcia to break down Villa's door. Finally, the evidence supports a finding that defendant intended the ensuing assault, when defendant went into the home and shot Villa. In sum, sufficient evidence exists to sustain defendant's conviction of first-degree home invasion.

Defendant next argues that he is entitled to resentencing for his first-degree home invasion conviction. Defendant maintains that the trial court engaged in an upward sentencing departure without articulating substantial and compelling reasons for doing so. In response, the prosecution argues that resentencing is not required because defendant's sentence fell within the recommended minimum sentencing guidelines range for armed robbery, the crime with the highest crime class.

If a trial court departs from the sentencing guidelines, the court must state on the record the reasons for departure. MCL 769.34(3); *People v Buehler*, 477 Mich 18, 24; 727 NW2d 127 (2007). Here, the trial court did not articulate any reasons for departure, nor did the court acknowledge that it was departing from the guidelines. Moreover, the court did not consider the two cases against defendant to be consolidated for sentencing. Rather, the court first sentenced defendant for the cause number involving the August 14 crimes (Docket No. 298709), and then sentenced defendant for the cause number involving the August 6 crimes (Docket No. 298710). Thus, it appears from the record that the trial court recognized the cases were separate, but mistakenly imposed an upward departure sentence for first-degree home invasion. The

imposition of a departure sentence was error, absent an articulation of any reason for the departure. We therefore remand for resentencing on defendant's first-degree home invasion conviction, or for articulation of substantial and compelling reasons warranting an upward sentencing departure for that conviction.

Defendant next argues that offense variable (OV) 8 was improperly scored at 15 points in the sentencing information report (SIR) prepared for Docket No. 298710, and that defense counsel was ineffective for failing to object to the scoring. We review unpreserved claims of sentencing error for plain error affecting substantial rights. *People v Kimble*, 470 Mich 305, 312; 684 NW2d 669 (2004). "Scoring decisions for which there is any evidence in support will be upheld." *People v Endres*, 269 Mich App 414, 417; 711 NW2d 398 (2006). "Where claims of ineffective assistance of counsel have not been preserved, [this Court's] review is limited to errors apparent on the record." *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004).

MCL 777.38(1)(a), concerning victim asportation or captivity, provides that OV 8 should be assessed 15 points where "[a] victim was asported to another place of greater danger or to a situation of greater danger or was held captive beyond the time necessary to commit the offense." While asportation is not defined, there must be some movement of the victim that is not incidental to the crime. *People v Spanke*, 254 Mich App 642, 647; 658 NW2d 504 (2003).

Here, the record supports a score of 15 points for OV 8. According to MCL 777.38, both Hernandez and Villa were to be counted as victims, because they were both placed in danger of injury or loss of life when they were both held at gunpoint. MCL 777.38(2)(a). And, both were asported to another place of greater danger or to a situation of greater danger or were held captive beyond the time necessary to commit the offense. MCL 777.38(1)(a). The armed robbery was complete when defendant demanded money from Villa while holding him at gunpoint in the house; therefore, holding Hernandez and Villa captive beyond that time warranted a score of 15 points for OV 8. Further, Hernandez and Villa were asported to another place and situation of greater danger when they were forced at gunpoint into separate vehicles and when defendant appeared to be about to shoot Villa. Defendant has failed to demonstrate plain error affecting his substantial rights on this unpreserved sentencing issue. Further, because counsel was not ineffective for failing to make a futile objection, defendant's claim of ineffective assistance of counsel for failing to object to the proper scoring of OV 8 is meritless. *People v Goodin*, 257 Mich App 425, 433; 668 NW2d 392 (2003).

Defendant next argues that the trial court erred in denying his motion to suppress. We review for clear error a trial court's findings of fact in a suppression hearing and review de novo its ultimate decision on a motion to suppress. *People v Hyde*, 285 Mich App 428, 438; 775 NW2d 833 (2009). The stop of defendant's vehicle implicates his right to be free from unreasonable searches and seizures. *People v Steele*, ___ Mich App ___; ___ NW2d ___ (Docket No. 299641, issued April 14, 2011), slip op at 3.

> Both the United States and Michigan Constitutions guarantee the right against unreasonable searches and seizures. US Const, Am IV; Const 1963, art 1, § 11; *People v Kazmierczak*, 461 Mich 411, 417; 605 NW2d 667 (2000). . . . However, in *Terry v Ohio*, 392 US 1, 21, 30-31; 88 S Ct 1868; 20 L Ed 2d 889

(1968), the United States Supreme Court held that the Fourth Amendment permits police to make a brief investigative stop (a "*Terry* stop") and detention of a person if the officer has a reasonable, articulable suspicion that criminal activity is afoot. The police may also make a *Terry* stop and brief detention of a person who is in a motor vehicle if the officer has a reasonable, articulable suspicion that the person is engaged in criminal activity. *People v Oliver*, 464 Mich 184, 192; 627 NW2d 297 (2001).

In determining reasonableness, the court must consider whether the facts known to the officer at the time of the stop would warrant an officer of reasonable precaution to suspect criminal activity. *Terry*, 392 US at 21-22. "The reasonableness of an officer's suspicion is determined case by case on the basis of the totality of all the facts and circumstances." *People v LoCicero (After Remand)*, 453 Mich 496, 501-502; 556 NW2d 498 (1996). "[I]n determining whether the totality of the circumstances provides reasonable suspicion to support an investigatory stop, those circumstances must be viewed 'as understood and interpreted by law enforcement officers, not legal scholars . . . '" *Oliver*, 464 Mich at 192, quoting *People v Nelson*, 443 Mich 626, 632; 505 NW2d 266 (1993). An officer's conclusion must be drawn from reasonable inferences based on the facts in light of his training and experience. *Terry*, 392 US at 27. The United States Supreme Court has said that deference should be given to the experience of law enforcement officers and their assessments of criminal modes and patterns. *United States v Arvizu*, 534 [US] 266, 273; 122 S Ct 744; 151 L Ed 2d 740 (2002); *Oliver*, 464 Mich App 196, 200. Fewer foundational facts are necessary to support a finding of reasonableness when moving vehicles are involved than if a house or home were involved. *Oliver*, 464 Mich at 192. [*Steele*, ___ Mich App at ___, slip op at 3-4.]

In this case, it was permissible for the police to make a *Terry* stop and briefly detain the individuals who were in the motor vehicle if they had a reasonable, articulable suspicion that the individuals were engaged in criminal activity. *Steele*, ___ Mich App at ___, slip op at 3. "There is no bright line rule to test whether the suspicion giving rise to an investigatory stop was reasonable, articulable, and particular." *Nelson*, 443 Mich at 635. However, "[c]ommon sense and everyday life experiences predominate over uncompromising standards." *Id*. at 635-636.

Here, the trial court found that the police received an emergency tone[1] from the same address where an armed robbery and kidnapping or abduction occurred one week earlier. As a detective was approaching the scene on a road which would be a reasonable route to return to

[1] Allegan Detective Leonard Mathis, testified: "We have a radio in the main room of our front office. It was tuned to . . . our primary channel. And we heard an emergency tone for emergency service . . . . This emergency – this tone for emergency service indicated that the home had been broken into and entered and that a person had been shot inside the residence."

Illinois, he saw a vehicle matching the description of the suspect vehicle from the earlier incident, driven by an individual matching the description of the suspects from the earlier incident. The trial court's findings of fact were supported by the record and were not clearly erroneous. *Hyde*, 285 Mich App at 438. Considering the totality of the circumstances, the facts conveyed by the detective to the other officers at the time of the stop "formed a solid basis upon which [the police] had a reasonable suspicion of criminal activity to justify the *Terry* stop." *Steele*, ___ Mich App at ___, slip op at 3-4. The trial court properly denied defendant's motion to suppress, because the stop of defendant's vehicle was justified where, considering the totality of the circumstances, the police had a reasonable suspicion that criminal activity was afoot.

Defendant next argues that his convictions of both assault with intent to rob while armed and armed robbery violate his double jeopardy protections against multiple punishments. We review unpreserved claims that a defendant's double jeopardy rights have been violated for plain error. *People v Meshell*, 265 Mich App 616, 628; 696 NW2d 754 (2005). "Both the United States and Michigan constitutions prohibit a person from twice being placed in jeopardy for the same offense." *People v Ford*, 262 Mich App 443, 447; 687 NW2d 119 (2004); US Const, Am V; Const 1963, art 1, § 15. Multiple punishments may be imposed in certain circumstances under both the federal and Michigan Double Jeopardy Clauses: '"in the context of multiple punishments *at a single trial*, the issue whether two convictions involve the same offense for purposes of the protection against multiple punishment is solely one of legislative intent.'" *Meshell*, 265 Mich App at 629, quoting *Ford*, 262 Mich App at 450.

This Court has held that assault with intent to rob while armed is a necessarily lesser included offense of armed robbery and that, therefore, convictions of both offenses for a single criminal episode violates a defendant's double jeopardy protections. *People v Johnson*, 90 Mich App 415, 421; 282 NW2d 340 (1979). Accordingly, on the facts of this case, defendant's convictions of both assault with intent to rob while armed and armed robbery violate the double jeopardy protection against multiple punishments for the same offense. "The remedy for conviction of multiple offenses in violation of double jeopardy is to affirm the conviction on the greater charge and to vacate the conviction on the lesser charge." *Meshell*, 265 Mich App at 633-634. Accordingly, we vacate defendant's conviction of assault with intent to rob while armed in Docket No 298710.

To summarize: In Docket No. 298709, we affirm defendant's convictions, but vacate defendant's sentence for first-degree home invasion and remand for resentencing on the first-degree home invasion conviction only. We do not retain jurisdiction. In Docket No. 298710, we vacate defendant's conviction and sentence for assault with intent to rob while armed, and affirm in all other respects.

/s/ Peter D. O'Connell
/s/ Patrick M. Meter
/s/ Jane M. Beckering